SUPREME COURT, U. S.

525

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IN THE

Supreme Court of the United States

EARNEST WILLIAM CABBLER,

HERBERT WILLIAM CABBLER,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

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IN THE

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EARNEST WILLIAM CABBLER,

HERBERT WILLIAM CABBLER,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, Earnest William Cabbler and Herbert William Cabbler, petition for a writ of certiorari as follows:

I. REFERENCE TO REPORTS OF OPINIONS

The opinion was delivered by the United States Court of Appeals for the Fourth Circuit on July 9, 1970 and is set forth on page 37 of this petition. The book numbers and page numbers of this opinion in the official and unofficial reports are not yet known.

II. STATEMENT OF GROUNDS TO INVOKE JURISDICTION

Jurisdiction is invoked on the grounds that: (1) the judgment sought to be reviewed was made and entered on July 9, 1970 within thirty days of the filing of this petition; (2) no rehearing or extension of time for filing this petition for certiorari are involved; and (3) the statutory provision believed to confer jurisdiction on this Court is 28 U. S. C. § 1254(1).

III. QUESTIONS PRESENTED

The questions presented by this petition are:

(1) Is the Gun Control Act of 1968 a valid exercise of Congressional power or is it without source of Congressional power and also invalid as an ex post facto law, an infringement upon the right to bear arms, an infringement upon the right of self-defense, a denial of due process of law, and a violation of the privilege against self-incrimination?

(2) Was the introduction into evidence of a Treasury Form signed by Herbert William Cabbler a violation of his privilege against self-incrimination?

(3) Was a gun introduced into evidence in the prosecution involving Earnest William Cabbler the product of an illegal search and seizure?

(4) Did the false signing of the Treasury Form by Herbert William Cabbler create two distinct offenses under Chapter 44 of Title 18 of the United States Code?

(5) Whether a belief that the information contained on the Treasury Form was correct, even though false, is

a defense to the statutes making it a criminal offense knowingly to sign a false statement?

IV. THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are:

(1) Article 1, Section 8, Clause 3 of the Constitution of the United States of America enumerating legislative authority which provides:

> "To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes".

(2) Article 1, Section 8, Clause 18 of the Constitution of the United States of America enumerating legislative authority which provides:

> "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or office thereof".

(3) Article 1, Section 9, Clause 3 of the Constitution of the United States of America limiting legislative authority which provides:

> "No Bill of Attainder or ex post facto Law shall be passed".

(4) Amendment II of the Constitution of the United States which provides:

> "A well regulated militia, being necessary to the security of a free State, the right of the people to bear Arms shall not be infringed".

(5) Amendment V, Clause 2 of the Constitution of the United States which provides:

> " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."

(6) Section 922(a)(6) of Title 18 of the United States Code which provides:

> "It shall be unlawful for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter."

(7) Section 923(g) of Title 18 of the United States Code which provides:

> "Each licensed importer, licensed manufacturer, licensed dealer, and licensed collector shall maintain such records of importation, production, shipment, receipt, sale, or other disposition, of firearms and ammunition at such place, for such period, and in such form as the Secretary may by regulations prescribe";

(8) Section 924(a) of Title 18 of the United States Code which provides:

> "Whoever violates any provision of this chapter or knowingly makes any false statement or representa-

tion with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine".

(9) Section 1202(a)(1) of Title 18 of the United States Code, Appendix, which provides:

"Any person who has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both".

The definitions of commerce, felony and firearm used as aforesaid are set forth in 18 U. S. C. appendix § 1202(c) as follows:

"(1) 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country;

(2) 'felony' means any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the law of a State and

punishable by a term of imprisonment of two years or less;

(3) 'firearm' means any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; or any firearm muffler or firearm silencer; or any destructive device. Such term shall include any handgun, rifle, or shotgun;"

V. STATEMENT OF THE CASE

This petition involves two separate criminal proceedings by the United States of America respectively against Earnest William Cabbler and Herbert William Cabbler in the United States District Court for the Western District of Virginia for their respective alleged violations of the Gun Control Act of 1968. They were tried separately on December 11, 1969 and convicted and appealed to the United States Court of Appeals for the Fourth Circuit where their cases were consolidated for the purpose of briefs, oral argument and opinion. Page references to the Appendix filed in the United States Court of Appeals for the Fourth Circuit are in brackets preceded by the letter "A". Page references to the transcript involving the prosecution of Herbert William Cabbler in the United States District Court for the Western District of Virginia are in brackets preceded by the letter "T". The Petitioners are jointly referred to as the "Cabblers"; the Petitioner, Earnest William Cabbler, as "Earnest"; the Petitioner, Herbert William Cabbler, as "Herbert"; and the Respondent, United States of America, as the "Government".

1. PRETRIAL PROCEDURE

On November 10, 1969 [A. 1], Earnest was indicted for possession of a firearm on August 8, 1969 in the City of Roanoke in the Western District of Virginia allegedly in violation of 18 U. S. C., Appendix, § 1202(a) [A. 3]. On November 24, 1969 [A. 1], Earnest filed a motion to dismiss the indictment because the statute is an ex post facto law [A. 3] and a separate motion to dismiss because the statute violated his right to bear arms and exercise his right of self-defense [A. 3 & 4].

Also on November 10, 1969 [A. 9], Herbert was indicted for knowingly making a false statement on March 17, 1969 in the City of Roanoke in the Western District of Virginia to acquire a firearm allegedly in violation of 18 U. S. C. § 922 (a) (6) [A. 11] and at the same time and place, knowingly making a false statement for the records of the seller of the gun allegedly in violation of 18 U. S. C. § 923 (g) [A. 11]. Also on November 24, 1969 [A. 9], Herbert filed a motion to dismiss the indictment because the statutes are ex post facto laws [A. 12 & 13] and because said statutes violated his right to bear arms and exercise his right of self-defense [A. 13].

Thus while Earnest and Herbert violated separate statutes at separate times, they were indicted at the same time and their aforesaid pretrial motions were made at the same time involving the same basic issues of law. They were both tried on December 11, 1969 [A. 2; A. 9 & 10].

In addition, on November 24, 1969 [A. 1], Earnest filed a motion to suppress the evidence of the firearm he allegedly possessed on August 8, 1969 because the same was obtained by illegal search and seizure [A. 4]; and on December 11, 1969 [A. 2], he filed a motion to dismiss

because the statute allegedly violated is predicated upon a finding by Congress that the possession of a firearm by him is an undue burden on interstate commerce when in fact there is no evidence that such possession is such a burden [A. 4 & 5]. The latter two issues raised by Earnest are not pertinent to the petition of Herbert.

Correspondingly on November 24, 1969 [A. 9], Herbert filed a motion to dismiss or consolidate the counts because the indictment alleges a single act to be two separate offenses [A. 11 & 12]. Also he filed a motion to dismiss the indictment or to suppress the evidence of the signed statement on the grounds that the statute infringes on his privilege against self-incrimination or the evidence of Form 4473 of the Department of Treasury—Internal Revenue Service violated his privilege against self-incrimination [R. 13]. These latter two issues are not presented by the petition of Earnest.

2. FACTS—EARNEST

On August 8, 1969 at approximately 2:00 P. M., two uniformed police officers of the City of Roanoke were near the southwest corner of Wells Avenue and First Street, Northwest, Roanoke, Virginia, in the Western District of Virginia. A private parking lot is located on said corner and at this particular time, the parking lot was under the immediate control of Earnest [A. 6] and a chain was around said parking lot to keep out the public [A. 6]. The two police officers saw Earnest standing on the parking lot and requested Earnest come to their automobile. Earnest took the pistol in question out of his pocket and placed it on the pavement under a car parked in the parking lot and then went to the officers' automobile parked at the curb in the street. One of the

police officers had stepped out of his car and was walking toward Earnest in the parking lot and passed him in the parking lot as Earnest walked to the police car. The police officer picked up the pistol and walked back toward the police car. The police then departed with the pistol without arresting Earnest.

The police officers saw Earnest with the pistol protruding out of his pocket prior to calling him and saw him place the firearm under the automobile. They could not see the pistol as one of them entered the parking lot and Earnest walked toward them. Earnest had been convicted of a felony in the Hustings Court of the City of Roanoke on February 11, 1959 and the police officers knew of this conviction [A. 7 & 8].

3. FACTS—HERBERT

On March 17, 1969, Herbert purchased a pistol from a pawn shop in the City of Roanoke in the Western District of Virginia and signed Form 4473 of the Department of Treasury—Internal Revenue Service (Exhibit Number 1) stating his correct name and address. From the testimony of the salesman [A. 15-21] it is doubtful the salesman made any explanation to Herbert that it was unlawful for him to purchase the pistol and Herbert specifically stated he was not asked if he had been convicted of a felony [A. 29; last answer]. Nevertheless, Herbert admitted knowing that it was unlawful for him to purchase the gun if he had been convicted of a felony [A. 30] but stated that he had been advised he had not been convicted [A. 30-31]. This advice came about in the year of 1964 when the Peoples Voters League was registering Negroes to vote. Herbert told the League members that he thought he had been convicted of a felony and

could not vote. The persons interested in registering him checked the court records and told him he had not been convicted of a felony and he could vote. In particular, Herbert had been convicted on May 1, 1961 and on November 14, 1962 of violating U. S. C. § 5601 (a) (12) for transporting non-tax paid whiskey [A. 23]; but he was told by the members of the Voters League that simply because these were federal crimes, they were not felonies, Herbert then became under the impression he had not been convicted of a felony [A. 30 & 31]. It is significant to note that Herbert made no attempt to purchase the gun in an assumed name and he listed his correct name and address when signing the form.

The trial court did not decide the factual issue of whether Herbert really thought he had not been convicted of a felony but held that ignorance of the law is no excuse [T. 29].

VI. ARGUMENT

A writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit should be allowed because the judgments of conviction of the trial court are plainly wrong. Furthermore, the opinion of the Fourth Circuit omitted any reasoning in refusing to disturb the convictions; and even if the Court disagrees with the legal argument hereby made and agrees with the decisions sought to be reviewed, an opinion explaining the reasons is necessary because the validity of the Gun Control Act of 1968 is an important and timely question of federal law which has not been, but should be, settled by this Court. See Rule 19.

POINT I: THE GUN CONTROL ACT OF 1968 IS AN EX POST FACTO LAW IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

Article I, Section 9, Clause 3 of the Constitution of the United States of America limits the power of the Congress of the United States by prohibiting its enactment of an ex post facto law. An ex post facto law is one which (1) that makes an act done before the passing of the law, and which was innocent when done, criminal; or (2) aggravates a crime or makes it greater than it was when committed; or (3) changes the punishment or inflicts a greater punishment than the law annexed to the crime when committed; or (4) alters the rules of evidence or receives less or different testimony than was required to convict at the time the offense was committed. *Calder* v. *Bull*, 3 Dall 386, 390; 12 L. Ed. 649, 650 (1798). More particularly an ex post facto law is one which imposes punishment for an act which was not punishable at the time is was committed, or imposes a punishment in addition to that prescribed. *Burgess* v. *Salmon*, 7. *Otto* 381, 24 L. Ed. 1104 (1878). In the cases hereby involved, the Cabblers were convicted of crimes punishable by imprisonment for more than one year, served their punishments years ago, and then were eligible to own, use or possess firearms. Then the Gun Control Act of 1968 was enacted (Pub. L. 90-351, June 19, 1968, 82 Stat 226 and amended by Pub. L. 90-618, October 22, 1968, 82 Stat 1214) prohibiting them from doing what they had been previously permitted to do prior to the enactment of the statute or statutes. In the case of Herbert who was convicted under Title I of the

Act, the Act did replace previous enactments (The National Firearms Act 1934 and The Federal Firearms Act of 1938); but this new enactment went much further altering the rules of evidence and requiring a statement of the eligibility to purchase a gun. In the case of Earnest who was convicted under Title VII of the Act, the act followed no previous enactment and the prohibition against owning a gun had changed from a person convicted of an act of violence to any person convicted of a felony and from a sawed-off shotgun used in commerce since the effective date of the enactment to a gun possessed by Earnest after the date of the enactment regardless of when used in commerce. Accordingly it is contended that the Gun Control Act of 1968 constitutes an additional punishment which did not exist at the time when their crimes were committed.

There is overwhelming precedent for the Cabblers' argument. In *Cummings* v. *Missouri*, 4 Wall 277, 8 L. Ed. 356 (1867), the Court held a disqualification from office or from pursuits of a lawful occupation is a punishment; and a statute which required an oath of past loyalty to the United States as a condition of holding office or pursuing a lawful avocation (acting as a clergyman) was an ex post facto law. In *Ex Parte*: *Garland*, 4 Wall 333, 18 L. Ed. 366 (1867), the Court similarly held a statute requiring an oath of past loyalty to the United States as a condition of continuing to practice before the Court was an ex post facto law. The statute had no relation to the fitness of the lawyer to continue his practice. These rulings were affirmed in *Pierce* v. *Carskaden*; 16 Wall 234 21 L. Ed. 276 (1873).

Under normal logic, the statutes here involved are obviously ex post facto laws. The confusion lies in the

holding of *Hawker* v. *New York*, 170 U. S. 189, 42 L. Ed. 1002 (1898). In that case, the Court merely ruled the State of New York had a right to define the qualifications to practice medicine. As part of such qualifications, New York could require good character as a condition of practicing medicine, and in determining good character, it could decide what was evidence of bad character such as the conviction of a crime. In that case, a physician had been convicted of committing an abortion prior to the enactment of the New York statute prohibiting felons from practicing medicine. The statute making such previous conviction a disqualification from practicing medicine was held not to be punishment but simply an exercise of proper police power. The distinguishing feature between additional punishment and police power was whether the regulation was reasonable to determine fitness to practice medicine.

However, Justice John Marshall Harlan wrote a vigorous dissent in *Hawker* v. *New York*, *supra*, logically showing the statute inflicted additional punishment by denying the physician the right to engage in his profession. It is interesting to note that Justice Harlan also wrote vigorous dissent two years earlier in *Plessy* v. *Ferguson*, 163 U. S. 537, 41 L. Ed. 256 (1896) and such dissent was adopted as the law of the land in *Brown* v. *Board of Education*, 347 U. S. 483, 98 L. Ed. 873 (1954). Possibly it is time to make another of his famous dissents the law of the land.

The precise issue of whether a gun law is an ex post facto law was decided in *Cases* v. *United States*, 131 F. 2d. 916 (1942) cert den 319 U. S. 770, 87 L. Ed. 1768 (1943) reh den 324 U. S. 889, 89 L. Ed. 1437 (1945).

In that case, the First Circuit held, applying the principles of *Hawker v. New York, supra*:

> "Thus, if the past conduct which is made the test of the right to engage in some activity in the future is not the kind of conduct which indicates unfitness to participate in the activity, it will be assumed, as it must be, that the purpose of the statute is to impose an additional penalty for past conduct. If, however, the past conduct can reasonably be said to indicate unfitness to engage in the future activity the assumption will be otherwise." 131 F. 2d. at page 921.

That court then held a gun law was not an ex post facto law by noting that it was a valid exercise of the power to regulate commerce by prohibiting the use of firearms to those who by their past conduct had demonstrated an unfitness to being trusted with such dangerous instrumentalities. First, it is submitted that the rationale is erroneous because the statute inflicts an additional penalty for past activity. Any statute creating a crime is based on a finding that citizens by their past conduct have made it necessary to outlaw the activity in the future; but punishment is never inflicted again for the past activity. An occasional exception to regulate specialized activity (such as the practice of medicine) cannot be broadened to exceptions for any general activity Congress may regulate. Otherwise there can never be an ex post facto law. Second, it is submitted that even if the rationale of the First Circuit is correct, the statute then being scrutinized only prohibited the possession of firearms by persons convicted of "murder, manslaughter, rape, mayhem, kidnapping, burglary, housebreaking; assault with the intetnt to kill, commit rape, or rob; asault with dangerous weapon, or assault with intent

to commit any offense punishable by imprisonment for more than one year." 131 F. 2d. at page 924. In short, there was a rational connection between the past activity to indicate an unfitness to possess a gun.

Certainly in the case of Herbert there is no rational connection between his crime and the prohibition under the statutes here involved. His crime was transporting untaxed whiskey [A. 24]. This past crime was only *mala prohibita*. At common law, there was nothing wrong with transporting untaxed whiskey. It became a wrong only because Congress said it was wrong. While this Congressional wrong may be necessary to protect the revenue, a violator would not necessarily be a violent person who should not have access to a gun. Furthermore, Herbert may have reformed. In this connection, Mr. Justice Harlan in his aforementioned dissenting opinion in *Hawker* v. *New York, supra*, stated the following:

> "The statute . . . takes no account whatever of the character, at the time of the passage, of the person whose previous conviction of a felony is made an absolute bar to his right to practice medicine. The offender may have become . . . a new man in point of character, and so conducted himself as to win the respect of his fellow men, and be recognized as one capable, by his skill as a physician, of doing great good. But these considerations have no weight against the legislative decree . . ." 170 U. S. at page 204.
>
> "Assuming, for the purpose of the argument, that the legislature may require for the continuance of the practice of medicine, that the practitioner shall possess professional knowledge and skill and also good moral character, it is obvious that such re-

quirement must relate to a present status or condition of a person coming within the terms of the act." 170 U. S. at page 204.

It is clear Justice Harlan felt that the statute then in question seized upon a past offense and made that alone the substantial ingredient of a new crime. 179 U. S. at page 205.

The District Court of the Southern District of Texas in *In Re: Gould*, 31 Fed. Supp. 793 (1940) makes an erroneous comparison of the gun laws to the habitual criminal statutes. An habitual criminal statute makes the penalty greater for a subsequent offense; but the citizen is under no penalty as long as he commits no subsequent crimes. Here the Cabblers, without doing anything, were prohibited from possessing firearms of any type. The statutes do more than create a class subject to its provisions. It punishes that class without the offenders included in the class doing any particular act.

The Gun Control Act of 1968 is an ex post facto law in its application to the Cabblers.

POINT II: THE GUN CONTROL LAW ACT OF 1968 IS AN INFRINGEMENT ON THE CABBLERS' RIGHT TO BEAR ARMS IN VIOLATION OF AMENDMENT II OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND ALSO IN VIOLATION OF THEIR RIGHT OF SELF-DEFENSE.

Amendment II of the Constitution of the United States provides:

> "A well regulated militia, being necessary to the security of a free State, the right of the people to bear Arms shall not be infringed."

At the time of the adoption of the Constitution, democratic society feared a standing army and relied on the mustering of citizens as a militia to preserve the nation in time of peril. The citizen soldier kept his own weapons. The constitutional guarantee, therefore, permits reasonable regulations of firearms as long as the citizen can keep the necessary firearms for war. Thus the Supreme Court of the United States in *Robertson* v. *Baldwin*, 165 U. S. 275, 41 L. Ed. 715 (1897) held:

> "Thus the freedom of speech and of the press does not permit the publication of libels . . . . blasphemous or indecent articles . . . ; the right of the people to keep and bear arms is not infringed by laws prohibiting the carrying of concealed weapons; . . ." 165 U. S. at pages 281 & 282. 41 L. at page 717.

Similarly, the right of self-defense includes the right to possess a gun. *Beard* v. *United States*, 158 U. S. 550, 39 L. Ed. (1895); *Bevley* v. *Commonwealth*, 185 Va. 210, 38 S. E. 2d. 331 (1946). Nevertheless, the right to keep and use firearms whether for defense of one's home or defense of one's country, is subject to reasonable regulations.

Specifically, the Supreme Court of the United States in *United States* v. *Miller*, 307 U. S. 174, 83 L. Ed. 1206 (1939) held the National Firearms Act (adopted on June 26, 1935 and set forth in the margin of the opinion) did not violate the Second Amendment without evidence tending to show prohibition of the use of a shotgun hav-

ing a barrel of less than eighteen inches in length would effect a citizen's right to bear arms in the militia. It is interesting to note that the District Court sustained a demurrer against the indictment because the statute violated the Second Amendment, *United States* v. *Miller*, 26 Fed. Supp. 1002 (1939) and no one appeared at the appeal before the United States Supreme Court on behalf of the appellees. Possibly the decision would have been different had there been a brief arguing both sides of the question. At any rate, the narrow holding is that a citizen may be prohibited from possessing a sawed-off shotgun which has no practical, legitimate use and is only used by criminals. There is a vast difference between prohibiting a felon from carrying a concealed weapon or possessing a sawed-off shotgun and from prohibiting a felon from owning any type of firearm which he might legitimately use.

In *Cases* v. *United States, supra*, the First Circuit misapplied the decision of reasonableness announced by the *Miller Case*. Instead it held the Second Amendment guarantee is only for possession of military weapons and in modern times with the standing armies, the *Miller Case* rule is obsolete. Such rationale cannot be accepted. If constitutional guarantees are obsolete, the Constitution should be amended. Furthermore, violence and destruction of property occurs more today than ever before. Certainly the Cabblers, in exercising their right of self-defense, have a more legitimate need of possessing a pistol than the citizen had in the year 1939 when the *Miller Case* was decided. In one of the cases at bar, Herbert testified that he purchased the pistol for protection of his restaurant which is located in a high crime area [A. 29]. *United States* v. *Tot*, 131 F. 2d. 261 (1942); *and Val-*

aquez v. *United States*, 131 F. 2d. 916 (1942) lose their significance by the reversal of the first cited case in *Tot* v. *United States*, 319 U. S. 463, 87 L. Ed. 1519 (1943). While the reversal was on the grounds that Congress cannot command by statute that proof of possession of a firearm by one convicted of a crime of violence creates a presumption that he received it in interstate commerce or received it after the effective date of the statute, the Court would not concern itself with additional constitutional reasons to reverse a criminal conviction when it reversed such conviction for a constitutional procedural reasons. While there are persuasive decisions from the courts of appeals, there has been no decision of the Court subsequent to *United States* v. *Miller, supra*, on the right to bear arms in the context presented here and no decision on the infringement of the right of self-defense.

The Gun Control Act of 1968 in its application to the Cabblers is an infringement upon the right to bear arms and the right of self-defense.

POINT III. TITLE VII OF THE GUN CONTROL ACT OF 1968 EXCEEDS SOURCES OF CONGRESSIONAL POWER.

Article I, Section 8, Clause 3, of the Constitution of the United States of America grants Congress the authority to regulate commerce among the several states and Clause 18 grants Congress authority to make all laws necessary for executing its powers. Title I of the Gun Control Act of 1968 under which Herbert was convicted concerns a prohibition against a felon purchasing

a gun in interstate commerce (or in this case, a false statement by the felon purchasing a gun in interstate commerce). Title VII of the Gun Control Act of 1968 under which Earnest was convicted prohibits the possession by a felon of a gun independently of any proof that the gun involved interstate commerce. While Herbert stipulated the gun he purchased in a pawn shop had been sent from another state to Roanoke, Virginia [A. 27], no similar stipulation or proof was made in the case involving Earnest.

The Government contends that Congress may under the Commerce Clause regulate local activities as long as they somehow affect interstate commerce and cites *Heart of Atlanta Motel* v. *United States,* 379 U. S. 241, 13 L. 2d. 258 (1964). However, that cited case holds there must be a substantial connection between the local activity and the national interest involved. Thus racial discrimination in a local restaurant might affect the free movement of the colored traveler going from one state to another. The same connection cannot be found for Earnest standing in a parking lot under his control with a gun protruding from his pocket.

The Congressional authority for the enactment of Title VII is found by so called findings of Congress in 18 U. S. C., Appendix, § 1201. By this enactment, Congress found the possession of a firearm by a felon is (1) a burden on commerce, (2) a threat to the safety of the President, (3) an impediment to the exercise of free speech and free exercise of religion, and (4) a threat to the effective operation of the Government. This, of course, is absolutely ridiculous and could only be characterized as a joke if it were not so serious. In the cases

at bar, both Cabblers possessed guns for the protection of a restaurant and parking lot located in a high crime area. The records do not show either possessed a firearm for anything but laudable purposes. Their possession of firearms were to maintain law and order in the restaurant and parking lot and thereby: (1) aided commerce by permitting travelers to have a safe place to eat, (2) protected the safety of the President by suppressing violence, (3) protected the exercise of free speech and the free exercise of religion by suppressing disorder, and (4) assisted in the effective operation of the Government by discouraging crime in the locality. While this may also be characterized as a joke by the Government, it is nevertheless true in these particular cases; and the simple truth is that there is no rational connection one way or the other between the possession of a firearm by a felon and the threats to commerce and Government operation. It is obvious that Title VII which requires no proof that the gun had any connection with interstate commerce is unreasonable, overbearing, arbitrary and unnecessarily restrictive; and the statute is the result of a frenzy of public opinion after the assassination of certain nationally prominent persons. Senator Long in arguing for the enactment of The Gun Control Act of 1968 stated that "you cannot do business in an area, and you certainly cannot do much of it and do it well as you like, if in order to do business you have to go through a street where there are burglars, murderers, and arsonists armed to the teeth against innocent citizens. So the threat certainly affects the free flow of commerce". In 114 Cong. Record 13,869 (1968). The Cabblers agree; and as businessmen operating a restaurant in a high crime area, they need to protetct the citizens doing business with them from such burglars, murderers and arsonists; but the Gun

Control Act prevents this by outlawing their laudable uses of guns.

While the poor wisdom of this legislation is for Congress and not for the courts to decide, the legislation must have some relation to the ends for which the police power of Congress exists. Man possesses certain inherent rights essential to his existence, such as the right of life and liberty, *R. F. & P. Company* v. *Richmond*, 145 Va. 225, 133 S. E. 800 (1926) and the right of personal security. *Poore* v. *United States*, 109 F. 2d. 147 (1940). The question of the constitutionality of the statute is not for legislative determination but for judicial determination. *See*: *Canadian Northern Ry. Co.* v. *Eggen*, 252 U. S. 553, at page 562, 64 L. Ed. 713 at page 716 (1920). The courts have the duty to invalidate an unconstitutional statute. *United States* v. *Brown*, 381 U. S. 347, 14 L. 2d. 484 (1965). In *United States* v. *Brown, supra*, the court held that an enactment by Congress making it a crime for a Communist to serve as a union employee after findings by Congress that political strikes endanger interstate commerce, is a bill of attainder. Without judicial trial, the statute inflicted punishment by denying Brown his employment. This is identical in principle to Congress makng it a crime for one convicted of a felony (regardles of the nature of the crime or the repentance by the felon) from owning a firearm (regardless of its type and even if it is a starter gun) upon a finding by Congress that such possession of a gun by a felon endangers the life of the President of the United States (when no President has been assassinated by a felon). Thus the findings by Congress are not rational and their purposes would have been accomplished more rationally if the findings abhorred the possession of a fire-

arm by a college student or a member of the opposite political party; and no one even suggests a prohibition against the possession of guns by persons in these classifications would be constitutional.

Notwithstanding the findings of Congress in 18 U. S. C., Appendix, § 1201, the crime for which Earnest was convicted under 18 U. S. C., Appendix, § 1202(a) (1) requires that the felon "receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act any firearm . . ." Commerce means travel or trade among the several states or between the District of Columbia and any state. 18 U. S. C., Appendix, § 1202(c) (1). Certainly the enactment by Congress can be interpreted to require the gun to have been transported from out of the state of Virginia into the state and possibly even for the transportation to have occurred after the enactment of the Act. Here there was no evidence that the firearm had ever been out of the state of Virginia. In *Tot* v. *United States, supra,* the court held that a provision of the Federal Firearms Act of 1938 was constitutionally invalid by creating a presumption that proof of possession of the firearm by one convicted of a crime of violence presumes he received it in interstate commerce and received after the effective date of the statute. Such irrational connection was held to violate the due process clause of the Amendment V of the Constitution of the United States.

Thus even if Title VII of the Gun Control Act of 1968 is within the authority of Congress under the commerce and incidental clauses, it nevertheless violates the due process clause.

POINT IV. TITLE I OF THE GUN CONTROL ACT OF 1968 IS INVALID BECAUSE IT DENIES DUE PROCESS OF LAW.

The question of Title VII of the Gun Control Act of 1968 being a denial of due process of law as guaranteed by Amendment V of the Constitution of the United States has been discussed in connection with sources of Congressional power in Point III. In addition, Title I suffers the same problem of overbreath and is not a reasonable regulation. As already explained under Point I in discussing ex post facto laws, the statute prohibits a felon such as Herbert who has not been convicted of a crime of violence from possessing a firearm. Neither *Reddy* v. *United States*, 403 F. 2d. 26 (1968) cet den 393 U. S. 1085, 21 L. 2d. 778 (1969) reh den 394 U. S. 967, 22 L. 2d. 570 (1969) nor *DePugh* v. *United States*, 393 F. 2d. 367 (1968) cet den 393 U. S. 832, 21 L. 2d. 102 (1968) discussed the question of the overbreath of the statutes in deciding upon the constitutionality of a similar prior gun law. Congressional legislation which discriminates in its classifications violates the due process clause of the Fifth Amendment of the Constitution of the United States. *Bolling* v. *Sharpe*, 347 U. S. 497, 98 L. Ed. 844 (1954) (Pertaining to racial segregation in federal schools.) The classifications must reasonably relate to the legitimate legislative purpose. *Duffy* v. *Wells*, 201 F. 2d. 503 (1953) (Decision upheld statute imposing death penalty for assault on the prison guard by an inmate serving life term when similar assaults by other prisoners were not so punishable.) Herbert was convicted of violating Chapter 44 of Title 18 of the United States Code. 18 U. S. C. § 921 (a) (3) defines a firearm as any weapon

(including a starter gun) designed to expel a projectile by the action of an explosive. (See also 18 U. S. C., Appendix, § 1202(c) (3) under Title VII.) This is a much broader definition than the one approved in *United States* v. *Miller, supra,* of a firearm being a shotgun having a barrel of less than eighteen inches in length. Furthermore, neither Herbert nor Earnest carried his pistol concealed or used it for bad purposes.

Obviously the entire Gun Control Act of 1968 is too broad in its application without rational classifications and results in the denial of due process of law.

POINT V. TITLE I OF THE GUN CONTROL ACT OF 1968 AND THE REGULATIONS PROMULGATED PURSUANT THERETO VIOLATE THE PRIVILEGE AGAINST SELF-INCRIMINATION.

Assuming the purchase of a firearm by Herbert was legally prohibited by Chapter 44, Title 18 of the United States Code, the question is then whether the requirement that Herbert sign the Treasury Form 4473 admitting or denying his guilt violates his right against self-incrimination guaranteed him by Amendment V of the Constitution of the United States of America.

The issue was similarly presented to the Court in *Haynes* v. *United States*, 390 U. S. 85, 19 L. 2d. 923 (1968). At that time, 26 U. S. C. § 5841 required Haynes register the firearm in question and 26 U. S. C. § 5851 punished him for possessing an unregistered firearm. The Court held the elements of the offense under § 5851 were identical to the elements of the offense under § 5841; that the hazards of incrimination created by the statutory re-

quirement of registration were real and appreciable; and that a proper claim of self-incrimination provided a full defense to any prosecution under § 5841 for failure to register said firearm or under § 5851 for possession of an unregistered firearm.

In the case at bar, the statute made it unlawful for Herbert to buy the gun; the Treasury Regulations required he state on the form whether or not he was eligible to buy said firearm; and the particular sections of the statute alleged to be violated made him guilty of falsely signing the form. (Herbert was indicted for knowingly signing a false statement to purchase the gun and knowingly signing the same form statement to be kept in the records of the seller.) Obviously the privilege against self-incrimination would have provided a full defense for a prosecution of Herbert for buying the gun and accordingly a compulsion to sign the form on the Treasury Regulations (for which Herbert was convicted for falsely signing) violated his privilege against self-incrimination.

The aforesaid decision is merely an extension of the doctrine announced in *Marchetti* v. *United States*, 390 U. S. 39 19 L. 2d. 889 (1968). Marchetti had been convicted of failing to register and pay an occupational tax for accepting wages. The Court held that such registration could not be employed to punish persons who defended the failure to comply with requirements of such provisions with a proper assertion of the privilege against self-incrimination; that Marchetti's right to assert his privilege against self-incrimination had not been waived because if he had asserted said right to the Treasury Department to justify a failure to register, he would be admitting criminal circumstances; and that the "re-

quired records" doctrine cannot violate his right against self-incrimination. The required record doctrine may require all people to keep and preserve certain kinds of records, such as bookkeeping information to ascertain income subject to income taxes. In the *Marchetti Case*, and here, the records were and are kept solely for the purpose of ascertaining a selective group inherently suspected of criminal activities. There is no point to Form 4473 except to ascertain that persons prohibited from purchasing firearms do not purchase them.

It is respectfully submitted that if the statute is not an unconstitutional violation of the privilege against self-incrimination, then the evidence of the Treasury Form 4473 should be suppressed as a violation of Herbert's privilege against self-incrimination.

POINT VI: THE GUN INTRODUCED INTO EVIDENCE IN THE PROSECUTION OF EARNEST WAS THE PRODUCT OF AN ILLEGAL SEARCH AND SEIZURE.

No search for the pistol introduced into evidence in the prosecution of Earnest was made under the authority of the United States under Rule 41 of the Rules of Criminal Procedure or otherwise. The police officers who made the warrantless search were agents for the Commonwealth of Virginia. In Virginia, it is provided by statute that:

> "No officer of the law or any other persons shall search any house, place, vehicle, baggage or thing except by virtue of and under a warrant issued by a proper officer." Va. Code § 19.1-88.

Under Virginia law, the police officer may not conduct a search without a warrant simply because he has reasonable grounds to believe a felony has been committed. Such reasonable grounds are simply grounds to obtain a search warrant; and Virginia Code § 19.1-88 prohibits any search without a warrant completely ignoring grounds for a warrantless search in other jurisdictions where exigent circumstances justify police search without a warrant. In *Chevrolet Truck* v. *Commonwealth*, 208 Va. 506, 158 S. E. 2d. 755 (1968), the Supreme Court of Appeals of Virginia elucidated on the application of this statute and Va. Code § 4-56 pertaining to searching an automobile without a warrant. That court noted that the exceptions to no searching without a warrant recognized by Federal law are generally applicable to the Virginia statutes and are: (1) Where the search is consented to; (2) Where the search is incidental to a lawful arrest; (3) Where the search is of abandoned property; and (4) Where contraband is in plain and open view.

Here Earnest was in a private parking lot with a chain around it. He did not consent to the police making the search. He was not arrested. He had not abandoned the gun but had it on the private property under his control at the immediate time of the search; the gun was not in plain and open view. Even if the Government could cite authority whereby exigent circumstances would permit such a search without a warrant, the Government has the burden of proof to show such emergency and generally prove the search and seizure is legal. *Morris* v. *Commonwealth*, 208 Va. 331, 157 S. E. 2d. 191 (1967).

In this latter regard, the Government may contend by way of argument that if the police officers had left the scene to obtain a search warrant, Earnest would have disposed of the gun before they would have returned. Hence, there was an emergency. However, the Government did not prove Earnest would have had such an opportunity if the search warrant was obtained. The evidence disclosed two police officers were in the patrol car at the time; and one of the officers could have remained at the scene and observed Earnest and the place where the gun was hidden on private property while the other officer went to obtain a search warrant. While not disclosed one way or the other by the evidence, the police officers do have radios in their patrol cars and an issuing justice is on duty twenty-four hours each day in the Municipal Building in the City of Roanoke. It would have been a rather simple matter to have called by radio and had an issuing justice appear on the scene to issue a warrant. While this may not be in evidence, the point is that the burden of proof is on the Government to show the emergency which included the burden to disprove the warrant was not readily available without losing the evidence to be obtained by the search and seizure.

Since the police officers were specifically prohibited from making the search, the gun was obtained illegally and is not admissible into evidence. *Mapp* v. *Ohio*, 367 U. S. 643, 6 L. 2d. 1081 (1961). Because Earnest was in charge of the private parking lot and (allegedly) had possession of the pistol, he was a person aggrieved by the unlawful search and seizure. *Alderman* v. *United States*, 394 U. S. 165, 22 L. 2d. 176, (1969). *Jones* v. *United States*, 362 U. S. 257, 4 L. 2d. 697 (1960).

Accordingly, the evidence of the gun in the prosecution of Earnest should have been suppressed.

POINT VII. THE INDICTMENT OF HERBERT CREATES TWO OFFENSES FOR THE SAME ACT.

Count 1 of the indictment of Herbert alleges that on March 17, 1969, he violated 18 U. S. C. § 922(a) (6) making it unlawful for him to make a false oral or written statement in connection with the acquisition of a firearm from a dealer by his signing Treasury Form 4473. Count 2 of the indictment alleges Herbert violated 18 U. S. C. § 923 (g) requiring a dealer to keep certain records because Herbert signed the same form which is part of the dealer's records. While it is conceivable Herbert could have made a false statement to obtain the gun without this same false statement being in the dealer's records, it is not possible under the facts of this particular case. Here Herbert signed one form one time and this single act was alleged by the indictment to be a violation of both sections. The proof to convict under the first count was identical to the proof to convict under the second count. The defense of not signing the statement or not knowingly signing it falsely would be a defense to both sections allegedly violated. Furthermore, neither section alleged to be violated prescribes the penalty. Instead the penalty for all violations of Chapter 44 of Title 18 of the United States Code is provided by 18 U. S. C. § 924 with sub-section (a) applicable here. The sub-section simply provides a punishment for willfully and knowingly making a false statement in violation of any provision of the chapter. Under this statutory arrangement, a single false statement could only result in a

single conviction no matter how many provisions in the chapter prohibited the false statement.

Even if the statutory language could be interpreted to make the single act of signing the form as two violations, Amendment V of the Constitution of the United States prohibits any person to be twice subjected or put in jeopardy for the same offense. In *Ashe* v. *Swenson*, 25 L. 2d. 469 (1970), the Court reaffirmed the "same evidence test." The majority opinion superimposed a "collateral estoppel" gloss to the same evidence test. A concurrent opinion goes further with the "same transaction test." The dissenting opinion rejects the collateral estoppel gloss but nevertheless affirms the same evidence test. Accordingly, from all points of view of the justices presently constituting the Court, the same evidence test applies. The proof of guilt under both counts of the indictment was the single act of falsely signing the Treasury form. Under no stretch of the imagination could this be construed to be anything but being convicted twice for the same offense.

POINT VIII. THE BELIEF THAT THE INFORMATION CONTAINED ON THE TREASURY FORM WAS CORRECT EVEN THOUGH FALSE, IS A DEFENSE TO THE STATUTES MAKING IT A CRIMINAL OFFENSE KNOWINGLY TO SIGN A FALSE STATEMENT.

Herbert was not indicted or convicted because he purchased the pistol from the pawnshop on March 17, 1969. Instead, he was convicted of willfully and know-

ingly making a false statement to deceive the pawnbroker with respect to a material fact in connection with the sale and also willfully and knowingly making the same false statement in the records to be kept by the pawnbroker. He made this false statement by signing Form 4473 of the Department of Treasury-Internal Revenue Service. Whether his signing of the Treasury Department Form be a single offense or two offenses, a necessary element of the offense or offenses is *willfully* and *knowingly* making a false statement in the form that he had not been convicted of a felony.

For the purpose of judicial review, there is no dispute that Herbert had been convicted of a felony and he therefore made a false statement when he signed the form; and there is no dispute that Herbert legitimately thought he had not been convicted of a felony and was unaware he was making a false statement. While the Government may argue that Herbert's testimony that he did not know that he had been convicted of a felony was an unsupported self-serving declaration, it nevertheless created an issue of fact. The trial court held:

> "This is not a theory that the court can accept, because they were felonies, felony convictions, and if he didn't know it, he should have known it" [T. 29, lines 21-23].

As the record discloses, a pretrial hearing was held on various legal contentions (including the ex post facto argument, the rights to bear arms argument, etc.) : and it then became obvious that the legal issues would have to be redetermined by judicial review. Consequently, the trial became a perfunctory matter of placing the evidence in the record in order to go forward with the

judicial review. Accordingly, there was really no adversary evidentary trial for either Earnest or Herbert and the evidence was substantially stipulated in both cases. For this reason, there was no major effort to document and corroborate Herbert's statements; but Herbert contends he can prevail on this issue of fact if it is a legal defense. The trial court preserved the point for the appeal by simply holding ignorance of the law was no excuse [T. 29].

Subsequent to Herbert's conviction by the trial court, the United States Court of Appeals for the Fourth Circuit held that the signing of the Treasury Form 4473, without knowledge that it is being signed falsely, cannot be a violation of 18 U. S. C. § 922(a) (6). *United States* v. *Hedgecoe*, 420 F. 2d. 458 (1970). For some reason that court failed to follow *Hedgecoe* in its decision in the case at bar on July 9, 1969 but the reason is obscure because the opinion is without stated rationale.

The Tenth Circuit in *Braswell* v. *United States*, 224 F. 2d. 706 (1955) cet den 350 U. S. 845, 100 L. Ed. 752 (1955) held that a mistake as to whether the accused had been convicted of a crime of violence was a mistake of law instead of a mistake of fact and consequently no defense to a conviction for violating the Federal Firearms Act of 1938. However, Herbert was not convicted for purchasing the firearm for which ignorance of the law was no excuse. Instead, he was convicted for knowingly making a false statement. If he factually did not know the statement was false, he could not be guilty regardless of whether his lack of knowledge was a mistake of law or of fact. Finally, if *Braswell* is not so distinguished from *Hedgecoe*, then a writ of certiorari

should be granted to resolve the conflict between the Tenth Circuit and the Fourth Circuit. See Rule 19(b).

Because Federal laws are so complex, Congress has recognized that every citizen may not know the law. Accordingly, in signing various bureaucratic forms, Congress makes an element of the offense "willfully and knowingly" signing the form falsely. An example is an income tax return. No matter how much tax law the taxpayer knows, he cannot possibly know everything about the revenue laws pertaining to his income taxes. He can never be certain his income tax return is absolutely correct. All the taxpayer can do is to state that he honestly believes the return correct. This is the same principle here involved.

For further example, 26 U. S. C. § 7201 makes it a felony for willfully attempting to evade or defeat taxes. In order to be guilty, the accused taxpayer must not only file a self-assessing tax return on which an undisclosed deficiency in taxes is due, but he must do so willfully and knowingly. *Sansome* v. *United States*, 380 U. S. 343, 13 L. 2d. 882 (1965) (Holding knowingly filing a false return with the intention of paying taxes later is willful.) Willfulness can be proved by circumstantial evidence of subsequent acts to fabricate an explanation of a false return. *United States* v. *Wilkins*, 385 F. 2d. 465 (1967). But, even presuming knowledge of the tax law, there can be no willful evasion without actual knowledge of the tax liability. *Ingram* v. *United States*, 360 U. S. 672, 3 L. 2d. 1503 (1959).

Correspondingly, 18 U. S. C. § 922 (a) (6) requires Herbert willfully and knowingly to state falsely he had not been convicted of a felony in order to induce the pawnbroker to sell him the gun. 18 U. S. C. § 924(a)

requires Herbert willfully and knowingly to make a false statement in violation of some provision of the chapter; that is, a false statement that he had not been convicted of a felony on the form to be kept as part of the pawnbroker's records under 18 U. S. C. § 923(g). If Herbert did not know he had been convicted of a felony, he could not have made the false statement willfully and knowingly.

Accordingly, the trial court's decision that ignorance of the law is no excuse was erroneous. It is obvious that Herbert gave his correct name and address when signing the form to purchase the gun. If he honestly thought he was not prohibited from purchasing the gun because he honestly did not believe he had been convicted of a felony, he was entitled to be acquitted on both counts in the indictment.

POINT IX. CONCLUSION OF ARGUMENT

The citizens of the United States of America have long cherished the right to possess or own a gun. Most citizens and legal authorities believe this basic right cannot be denied because of the Amendment II of the Constitution of the United States. Although there is tacit approval by the Court of past gun regulations by denying writs of certiorari to decisions of courts of appeal validating such gun regulations, the Court has never sanctioned widespread firearm and gun control legislation. In *United States* v. *Miller*, *supra*, the Court did approve the National Firearms Act but limited its decision by saying the law could prohibit the use of a shotgun having a barrel of less than eighteen inches in

length which would have no reasonable use for legitimate purposes and only a use for criminal purposes. In *Tot* v. *United States, supra,* the Court held a provision of the Federal Firearms Act invalid. There has been no other decision directly discussing the problem. In as much as *Miller* involved an appeal by the Government from a demurrer to the indictment and no counsel appeared in opposition to the Government, there is really slight authority for the approval of any gun regulations. Even if there were a recent approving decision by this Court, the new Gun Control Act of 1968 goes too far in its regulations being the product of emotionalism after the assassination of nationally prominent persons. Accordingly, a decision by the Court clarifying the permitted use of gun regulations is necessary.

Factually, such a sweeping new criminal enactment has created injustice. In the cases at bar, the Cabblers did nothing inherently wrong. Herbert openly purchased a gun for protection of his restaurant located in a high crime area. Earnest merely had a gun protruding from his pocket (and thereby not in violation of local laws against carrying concealed weapons) while standing on private property under his control. Usually a technical violation of an obscure regulatory statute not involving moral turpitude would result in a minor fine. Here, Congress makes the violations felonies. Thus the Congressional zeal to oppose crime by severe gun legislation results in punishing basically innocent persons. Under such circumstances, even if the new gun legislation is ultimately held to be a valid exercise of Congressional power, justice requires an initial review by the Court before many more prosecutions by the Government are commenced.

A writ of certiorari is, therefore, desirable in order to decide this important question of federal law which has not been, but should be, settled by the Court.

VII. JUDGMENT SOUGHT TO BE REVIEWED

The judgment sought to be reviewed was made and entered by the United States Court of Appeals for the Fourth Circuit on July 9, 1970 and is as follows:

"PER CURIAM:

This is the consolidated appeal of two brothers, Earnest and Herbert Cabbler, who were separately tried and convicted on December 11, 1969 for violations of Federal gun control laws. Earnest was found guilty of possessing a firearm after having previously been convicted of a felony in violation of 18 USC App. 1202 (a) (1). Herbert was convicted on charges of making false statements both in connection with the acquisition of a firearm in violation of 18 USC 922 (a) (6) and with respect to the records required to be kept by a firearms dealer in violation of 18 USC 924 (a).

Having carefully considered all of the numerous points raised by the appellants in this appeal, including inter alia the constitutionality of the Gun Control Act, the sufficiency of the evidence to convict, and an allegedly illegal search and seizure, we are not persuaded that the convictions should be disturbed.

Affirmed."

VIII. CONCLUSION

For the reasons hereinabove stated, the Court should issue a writ of certiorari to the judgments sought to be reviewed.

Respectfully submitted,

EARNEST WILLIAM CABBLER,

HERBERT WILLIAM CABBLER,

By John H. Kennett, Jr.

Their Counsel

John H. Kennett, Jr.
133 Kirk Avenue, Southwest
Roanoke, Virginia
Counsel for Petitioners

IX. PROOF OF SERVICE

I, John H. Kennett, Jr., counsel for the Petitioners, and a member of the bar of the Supreme Court of the United States, do hereby certify that, on the 8th day of August, 1970, I served a true copy of the foregoing Petition for Writ of Certiorari on the Respondent by mailing the same in a duly addressed envelope by airmail postage prepaid to the Solicitor General, Department of Justice, Washington, D. C. 20530 and also to Leigh B. Hanes, Jr., United States Attorney for the Western District of Virginia, Post Office Building, Roanoke, Virginia.

JOHN H. KENNETT, JR.
Counsel for Petitioners

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SUPREME COURT, U. S.

No. [illegible]

In the Supreme Court of the United States

OCTOBER TERM, 1959

EARNEST WILLIAM CARELOCK, JR. AND
HERBERT WILLIAM CARELOCK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

[illegible]
Solicitor General

[illegible]
Assistant Attorney General

[illegible]
[illegible]

[illegible]
[illegible]

[illegible]
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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 525

EARNEST WILLIAM CABBLER and
HERBERT WILLIAM CABBLER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1970. The petition for a writ of certiorari, filed on August 10, 1970, is out of time under Rule 22(2) of the Rules of this Court; peti-

tioner subsequently filed a motion requesting an extension of time. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the prohibition in the Gun Control Act of 1968 against possession of a firearm by a convicted felon is unconstitutional as an ex post facto law or as an infringement upon the right to bear arms or the privilege against self-incrimination.

2. Whether the seizure of a pistol from petitioner Earnest Cabbler was unlawful.

3. Whether Herbert Cabbler's asserted belief that he had not been convicted of a felony is a defense to his conviction for the false statement to that effect.

4. Whether the claim that two counts constituted one offense affects the conviction where the two counts were treated as one for sentencing.

STATUTES INVOLVED

The Gun Control Act of 1968, 82 Stat. 236, 18 U.S.C. (Supp. V) Appendix provides in pertinent part:

18 U.S.C. 1202(a):

> Any person who (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. (Supp. V) 922 (a)(6) provides in pertinent part:

> It shall be unlawful * * * for any person in connection with the acquisition or attempted acquisition of any firearm or ammunition from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, knowingly to make any false or fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive such importer, manufacturer, dealer, or collector with respect to any fact material to the lawfulness of the sale or other disposition of such firearm or ammunition under the provisions of this chapter.

18 U.S.C. (Supp. V) 924 (a) provides:

> Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

STATEMENT

After trial without a jury in the United States District Court for the Western District of Virginia, petitioner Earnest W. Cabbler was found guilty of violating 18 U.S.C. App. (Supp. V) 1202(a)(1), by possessing a firearm after having been convicted of

a felony. He was sentenced to one year, with eight months suspended and three years probation.

After a separate trial in the same court, also without a jury, petitioner Herbert W. Cabbler[1] was convicted of making a false statement intended to deceive a licensed firearms dealer with respect to the purchase of a firearm in violation of 18 U.S.C. (Supp. V) 922(a)(6), and, on a second count, of making a false statement for the records of the seller in violation of 18 U.S.C. (Supp. V) 924(a). The two counts were consolidated for sentencing. Herbert was sentenced to one year, with six months suspended and three years probation.

The court of appeals consolidated the two cases on appeal and affirmed both convictions.

1. The stipulated facts at Earnest's trial show that on August 8, 1969, two patrolmen of the Roanoke Police Department observed him leaving a building with a firearm visibly protruding from his rear pocket. The officers knew Earnest was a convicted felon and when he reached a well-lighted parking lot near the building, they asked him to come to the patrol car, at which point he removed the firearm from his pocket and placed it under an automobile. One of the officers went directly to the automobile and retrieved the gun. The two officers then left without placing Earnest under arrest. Earnest had previously been convicted in the Hustings Court of the City of Roanoke of the felony of malicious bodily

[1] Petitioners are brothers and will be referred to by their first names throughout this brief.

injury with intent to maim, disfigure, disable and kill. (I.R. 23-24.)

2. Herbert purchased a .38 caliber pistol from a Roanoke pawnshop on March 17, 1969 (T. 3).[2] Although he had twice been convicted, in 1961 and 1962, of removing and concealing distilled spirits on which the tax had not been paid, and had served a one-year sentence after revocation of parole in 1962, Herbert told the salesman that he had not been convicted of a felony (T. 4). Prior to signing Form 4473, Herbert was given the opportunity to read it (T. 5-6). In pertinent part, the form stated:

> NOTICE TO TRANSFEREES. The following persons are prohibited from receiving a firearm in interstate or foreign commerce under 18 U.S.C., Chapter 44 of Title VII of Public Law 90-351, as amended (18 U.S.C., Appendix): * * * (2) persons under indictment for, or who have been convicted of, a crime punishable for a term exceeding 1 year; * * *.

The salesman also read this statement aloud to Herbert (T. 9).

Herbert, a high school graduate, testified that he operated a restaurant in a high crime district and bought the gun for protection (T. 18). Although he knew convicted felons were not permitted to purchase guns (T. 18), he thought his prior convictions were not for felonies because he had been so advised

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[2] The transcript of Herbert's trial, referred to herein by "T." followed by page number, is found in the envelope constituting p. 31 of Vol. II of the record filed in this Court.

by representatives of the People's Voter League during a registration drive in 1964 (T. 19-20).

ARGUMENT

1. While both petitioners attack the constitutional validity of the Gun Control Act of 1968, the issues thus raised are pertinent only to Earnest's case. Herbert was convicted of willfully making false statements under the Act and cannot defend on the basis that an unconstitutional statute evoked his fraudulent answers. *Bryson* v. *United States*, 396 U.S. 64; *United States* v. *Knox*, 396 U.S. 77; *Dennis* v. *United States*, 384 U.S. 855; *Kay* v. *United States*, 303 U.S. 1.

Earnest contends the Act is an ex post facto law and therefore unconstitutional. But the Act is prospective only, proscribing activities that take place after its effective date, not before. Only if past criminal conduct is not a reasonable criterion for determining present fitness to possess a gun could this otherwise prospective statute be considered an ex post facto law. *Hawker* v. *New York*, 170 U.S. 189; see *Cases* v. *United States*, 131 F. 2d 916 (C.A. 1), certiorari denied *sub nom. Velazquez* v. *United States*, 319 U.S. 770, upholding the predecessor of the in-

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[1] The statute does not, in any event, infringe upon the privilege against self-incrimination. Furnishing the information required on the form does not compel the purchaser to incriminate himself; it merely precludes his purchase because of his prior felony. If the ban on possession by a felon is valid, as discussed in the text, then it is entirely reasonable to require a person purchasing a gun to state that he is not a felon.

stant statute against a similar contention.[4] The aim and effect would then be punishment not regulation.

In this regard Earnest further argues that conviction of a felony is not a rational basis for deeming a person unfit to possess a firearm. We point out, however, that Congress has not imposed an absolute ban; exceptions have been provided, and persons who show a legitimate need for firearms and fitness to possess them may obtain administrative relief under 18 U.S.C. (Supp. V) 925. See also 18 U.S.C. App. (Supp. V) 1203. As the Ninth Circuit recently held in *United States* v. *Thoresen*, Nos. 24,432, 24,433, decided June 8, 1970, this solves the classification problem in a "very practicable and reasonable manner." See also *United States* v. *Trioli*, 308 F. Supp. 358 (D. Mass); *United States* v. *Wiley*, 309 F. Supp. 141 (D. Minn). Congress made rational findings supporting the general prohibition—as any regulatory legislation requires—and the exceptions adequately provide for any overinclusions.

Earnest also argues that the language of Section 1202(a)(1), punishing a felon who "receives, possesses, or transports in commerce or affecting commerce" a gun, should be interpreted to require allegation and proof by the government that his firearm was "in commerce or affecting commerce" at the moment he was found in possession. However, the pur-

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[4] See also *Smith* v. *United States*, 312 F. 2d 119 (C.A. 10); *United States* v. *Biancofiori*, 422 F. 2d 584 (C.A. 7), certiorari denied, 398 U.S. 942; *United States* v. *Wechsler*, 392 F. 2d 344 (C.A. 4), certiorari denied, 392 U.S. 932.

pose of the Act, together with its legislative history, clearly show the intention to mitigate identified evils by forbidding possession of firearms to specified classes of specially risky people, regardless of whether the possession itself occurred "in commerce or affecting commerce," a factor that in no wise diminishes the danger. *United States* v. *Bass*, 308 F. Supp. 1385 (S.D. N.Y.), recently followed in *United States* v. *Daniels*, No. 25,297 C.A. 9, decided September 8, 1970.

As to the claim that the Act exceeds congressional powers, "[t]here is no need at this date in our history to document at length the power of Congress to reach intrastate occurrences which, in their voluminous and cumulative impact, may or do threaten the course of interstate commerce." *United States* v. *Bass*, *supra*, 308 F. Supp. at 1388, citing cases; accord, *United States* v. *Wiley*, *supra*, 309 F. Supp. at 143-144. Congress was entitled to view the number of crimes involving firearms as creating a burden on commerce. Moreover, in light of recent tragedies Congress had ample basis for its findings that the prohibited conduct constitutes a threat to the safety of the President and Vice President of the United States, an impediment or threat to the exercise of free speech and free exercise of religion, and a threat to the continued and effective operation of the government of the United States and the state governments. 18 U.S.C. App. (Supp. V) 1201.

There is nothing to the claim that regulation of firearms violates the Second Amendment. That amendment provides "A well regulated militia, be-

ing necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed." Precluding a convicted felon from possessing a gun does not impair the efficiency of a well-regulated militia. See *United States* v. *Miller*, 307 U.S. 174; *Cases* v. *United States*, 131 F. 2d 916 (C.A. 1), certiorari denied *sub nom. Velazquez* v. *United States*, 319 U.S. 770; *United States* v. *Tot*, 131 F. 2d 261 (C.A. 3), reversed on other grounds, 319 U.S. 463.

2. Earnest asserts that the pistol that was the basis of his prosecution was the product of an illegal search and seizure because Virginia law prohibits searches without a warrant under any circumstances. The Virginia courts have not so interpreted the statute,[5] and, in any event, the officers did not violate the Fourth Amendment. The gun was in plain view and the officers observed it from the street, where they had a right to be. A search therefore did not take place. And there can be no question that the seizure was valid. Earnest was known to be a convicted felon and the gun was an instrumentality of a felony[6] which the officers observed being committed. Neither the Fourth Amendment nor the law of Virginia prohibits seizing the weapon in these circumstances.

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[5] In *Carter* v. *Commonwealth*, 209 Va. 317, certiorari denied, 394 U.S. 991, the Virginia Supreme Court of Appeals explained that the Virginia Code Section 19.1-88 affords the same protection as that granted by the Fourth Amendment and forbids only unreasonable searches without a warrant.

[6] That is, possession of a firearm by a convicted felon.

3. Herbert argues that the court improperly disallowed his defense that the Voter League misled him into thinking he had not been convicted of a "felony." But the statute, 18 U.S.C. (Supp. V) 922(h)(1); and the form, Internal Revenue Service Form 4473, which was read to him, speak not in terms of "felonies," a word with a somewhat technical meaning, but rather of "persons under indictment for, or who have been convicted of, a crime punishable for a term exceeding 1 year." Herbert had been twice convicted of violating 26 U.S.C. 5601(a)(12), a crime punishable by imprisonment for not more than 5 years, and at the least he was on notice of this. In this situation the trial judge was obviously correct in refusing to excuse Earnest's false statement on the theory he proposes.[7]

4. Herbert also contends that the indictment here creates two offenses for the same act of falsely stating that he had not been convicted of a felony and therefore violates the Fifth Amendment's prohibition against double jeopardy. Whatever the merits of this contention in a case such as this where there has been only a single prosecution for crimes arising out of the same occurrence, cf. *Ashe* v. *Swenson*, 397

[7] In *United States* v. *Hedgecoe*, 420 F. 2d 458 (C.A. 4), on which Herbert principally relies, the defendant signed form 4473 without reading the Notice to Transferees, and there was no other evidence that the defendant acted with the requisite knowledge. Also, the reversal in *Hedgecoe* was based on a faulty arraignment and guilty plea under Rule 11, F.R.Crim.P. Here, Petitioner had the opportunity to read and had read to him the "punishable for a term exceeding 1 year" language.

U.S. 436, the issue is not presented here for the obvious reason that the two counts were consolidated for sentencing and the one year sentence (six months in jail, six months suspended, three years probation) was well within the maximum $5,000 fine and five year prison sentence that could have been imposed for any one violation of 18 U.S.C. (Supp. V) 924.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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